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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KOBY DEAN BOYETT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OLNEY G. WALLIS
1900 North Loop West, Suite 500
Houston, Texas 77018
(713) 956-1300
(713) 680-0804 (Fax No.)

Attorney for Petitioner
Koby Dean Boyett

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Alpha Law Brief Co. — 6113 Aletha Lane — Houston, Texas 77081 — 789-2000

QUESTIONS PRESENTED

(1) Does a witness' invocation of the testimonial privilege against self-incrimination invariably subordinate the Sixth Amendment right of an accused to obtain favorable testimony by compulsory process?

(2) Does the Government's non-constitutional right of cross-examination subordinate an accused's constitutional right to present a defense?

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THE OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Petitioner's conviction, and holding in pertinent part that the Sixth Amendment right of an accused for compulsory process to obtain favorable testimony is, without exception, subordinate to a witness' Fifth Amendment testimonial privilege, is reproduced as Appendix A. *United States v. Boyett,* 923 F.2d 378 (5th Cir. 1991). The judgment of the District Court is reproduced as Appendix B.

JURISDICTION

The Court of Appeals rendered its decision affirming Petitioner's conviction on January 30, 1991. A motion for rehearing was not filed with the Court of Appeals. This petition for certiorari was filed with the Clerk of this Court within ninety (90) days after entry of the Court of Appeals' judgment and is timely. Supreme Court Rule 13.1.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The questions presented involve the Compulsory Process Clause of the Sixth Amendment to the United States Constitution, which reads in its entirety as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; *to have compulsory process for obtaining witnesses in his favor,* and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Petitioner, Koby Dean Boyett, was indicted by a federal grand jury in the Southern District of Texas in a three count indictment for:

(1) Conspiring to manufacture methamphetamine; 21 U.S.C. § 841(a)(1), 841(b)(1)(A) and 846;

(2) Aiding and abetting the attempted manufacture of methamphetamine; 21 U.S.C. § 841(a)(1), 841 (b)(1)(B) and 846, and 18 U.S.C. § 2; and

(3) Use and carrying a firearm during the commission of a drug trafficking offense; 18 U.S.C. § 924 (c)(1).

Boyett pled "not guilty." The case was tried to a jury in the United States District Court for the Southern District of Texas, Houston Division, the Honorable United States District Judge Melinda Harmon, presiding. The jury found Boyett "not guilty" of counts 1 and 3 (conspiracy and the firearms violation), and "guilty" of count 2 (aiding and abetting the attempted manufacture of methamphetamine).[1] Boyett timely appealed his conviction and sentence to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit had jurisdiction of Boyett's appeal pursuant to 28 U.S.C. § 1291. On January 30, 1991, the Fifth Circuit affirmed Boyett's conviction and sentence.

The Evidence

During June 1989, Boyett moved to Spring, Texas to live in a duplex with his cousin, Troy Jones, and Jones' girlfriend, Carrie Brown. (S.F. 3: 100). Jones and Brown occupied the master bedroom downstairs, and Boyett moved into a small upstairs bedroom in a loft area of the duplex. (S.F. 3: 105). On June 27, Boyett drove Jones to a chemical supply store, which was under surveillance by agents of the Drug Enforcement Administration. (S.F. 1: 94). Boyett parked the

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1. Boyett was sentenced to the statutory minimum of 10 years confinement, and a consecutive five year period of probation.

car, Jones got out, went inside the chemical store, and ordered precursor chemicals from an employee. (S.F. 1: 94). Jones and the employee then left the front sales room and walked into a warehouse section in the rear. (S.F. 1: 95). After Jones and the employee left, Boyett got out of his car and went into the sales room. Jones and the employee returned to the sales room with a cardboard box and a small container of chemicals. (S.F. 1: 102). Jones and Boyett spoke in an inaudible voice, Jones paid for the chemicals, picked them up, and took them outside and put them in the trunk of the car. Boyett got behind the wheel, Jones entered the car on the passenger's side, and they drove away. (S.F. 1: 97).

Drug Enforcement Administration agents followed the car driven by Boyett to the duplex where Jones, Brown, and Boyett lived. (S.F. 1: 136).

When Boyett's car arrived at the duplex, it pulled into the driveway. Boyett and Jones got out, and Jones took the cardboard box with chemicals out of the trunk and into the duplex. (S.F. 1: 117).

Drug Enforcement Administration agents maintained surveillance on the duplex during the morning of June 28. (S.F. 1: 119). That afternoon, the Agents obtained a warrant and searched the duplex. A methamphetamine laboratory was found in the attic, and several weapons and traces of methamphetamine were found in Boyett's room.

The Excluded Evidence

When the search warrant was being executed, DEA Agents questioned Brown and Jones on the scene, concerning, among other things, the level of Boyett's involve-

ment in the methamphetamine enterprise; both denied his participation.

Prior to trial the Government filed a motion in limine to exclude the Brown and Jones statements of Boyett's non-participation as hearsay. The trial court granted the Government's motion in limine, and the jury was not permitted to hear those statements.

Boyett subpoenaed both Jones and Brown. Jones had pled guilty to an information and was awaiting sentencing. Brown had not been charged with any criminal offense, although she had been interviewed by DEA agents on several occasions prior to trial. (S.F. 3: 79).

The court conducted an evidentiary hearing outside the presence of the jury regarding the testimony of both Jones and Brown. At the evidentiary hearing, Jones testified that although Jones and Boyett lived in the same house, they had different schedules and didn't spend much time together. (S.F. 3: 33).

The Troy Jones Hearing

On June 27, Jones got up around 11:00. He had gone to the chemical store alone the day before, but was unable to get in because it was closed. (S.F. 3: 34-35). Jones did not tell Boyett why he was going to the chemical store, nor did he tell Boyett what chemicals he was buying. (S.F. 3: 36). Boyett was never present, nor aware that Jones was making methamphetamine. (S.F. 3: 37). After Jones and Boyett finished running their errands on June 27, and returned to the duplex, Jones took the box of chemicals out of the car and put them in the garage. (S.F. 3: 38). Jones intentionally waited until after Boyett went to bed, and about 9:00 p.m. mixed a formula and

put it on the upstairs laboratory. (S.F. 3: 39). The laboratory belonged to Jones.

After Jones put the chemicals on the mantel, Jones and Brown left the duplex and didn't return until about 1:00 a.m. (S.F. 3: 39). Jones did not get up until about 11:30 on June 28. Boyett was already up and outside by the time Jones got out of bed. (S.F. 3: 40). When Jones got up he went to the attic and unplugged the laboratory mantel. (S.F. 3: 40).

After the Drug Enforcement Agents ran their search warrant they interviewed Jones. He told them that the methamphetamine laboratory was his, described how long he had been making methamphetamine, and told the agents that Boyett was not involved. (S.F. 3: 41).

Following his arrest, Jones talked to DEA agents on many occasions. He consistently told all the agents that Boyett was not involved. (S.F. 3: 42-43). When Jones was making methamphetamine, he tried to do so when Boyett was either away from the duplex, or asleep. (S.F. 3: 47).[2]

Jones responded completely regarding his activities on June 27 and 28, but refused, pursuant to the Fifth Amendment, to answer six questions asked by the Government about making methamphetamine at other times. (S.F. 3: 51-64). The District Court found that the jury should not be allowed to hear Jones testify, because the Government was denied effective cross-examination.

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2. On June 28, when Jones was making methamphetamine, he intended to make between 84 and 94 grams. (S.F. 3: 63). The amount of methamphetamine which Jones intended to make was of particular significance, since the Government indicted and the jury convicted Boyett of aiding and abetting the attempted manufacture of over 100 grams, which required a minimum sentence of 10 years confinement. 21 U.S.C. § 841(b)(1)(A)(viii).

The Carrie Brown Hearing

When Carrie Brown was called by the defense the Government expressed concern that Brown might not be aware of her rights. (S.F. 2: 93). At the insistence of the Government, the Court advised Brown that her testimony might tend to incriminate her, and asked Brown if she wished to testify. Brown responded that she did not wish to testify. (S.F. 3: 75). The Government requested that Brown be excused, and the trial court excused her. (S.F. 3: 78).

Conclusion of the Trial

Deprived of the testimony of both Jones and Brown, Boyett testified.

The Government, prior to jury argument, made an oral motion in limine that Boyett's counsel not be permitted to refer in final argument to Jones or Brown whose testimony was excluded. When Government counsel argued to the Court that he considered it proper rebuttal to argue that Boyett could have subpoenaed Jones and Brown (S.F. 4: 8-11), the Court granted the Government's motion in limine. Boyett was not permitted to refer to the excluded testimony of Jones or Brown, even in the context of reasonable doubt.

The Fifth Circuit Decision

On appeal to the Fifth Circuit, Boyett contended that these collective rulings effectively deprived him of his Sixth Amendment right of compulsory process to obtain favorable testimony. The Fifth Circuit rejected Boyett's contention that excluding the testimony of Jones and

Brown subordinated his constitutional right to present a defense to the Government's non-constitutional right to effectively cross-examine by concluding that an accused's right to compulsory process must give way to a witness' Fifth Amendment privilege not to give testimony that would tend to incriminate him.

The Fifth Circuit further sustained the trial court's decision to strike all of the testimony of Jones and Brown, since that decision was well within its discretion citing *United States v. Nobles,* 422 U.S. 225 (1975) and *Lawson v. Murray,* 837 F.2d 653 (4th Cir.) *cert. denied,* 488 U.S. 821 (1988).

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Fifth Circuit has decided an important issue of federal constitutional law which has not specifically been, but should be, settled by this Court, namely, whether the rights of an accused to compulsory process must always yield to the Fifth Amendment privilege of a witness not to give testimony, an issue reserved for consideration in *Washington v. Texas,* 388 U.S. 14, at 23 n. 21 (1967). The Fifth Circuit opinion is further in conflict with the spirit of applicable decisions of this Court upholding the sanctity of the Sixth Amendment right to proffer favorable evidence, namely, *Washington v. Texas,* supra; *Chambers v. Mississippi,* 410 U.S. 284 (1973); and *Rock v. Arkansas,* 483 U.S. 44 (1987).

ARGUMENT AND AUTHORITIES

In 1963, Justice Hugo Black, writing for the majority of this Court, penned *Gideon v. Wainwright,* 372 U.S.

335 (1963), guaranteeing an accused the right to counsel, pursuant to the express provisions of the Sixth Amendment. *Gideon,* supra, forever archived the unfair practice of permitting "the people with counsel," to deprive "an accused without counsel" of his liberty alongside its analogous standards of the dungeon and the rack from the middle ages. "The Sixth Amendment stands as a constant admonition that if the Constitutional safeguards it provides be lost, justice will 'not still be done.' " *Gideon v. Wainwright,* supra. Justice Black went on to conclude that the right to be heard avails little, if it does not comprehend the right to be heard by counsel. The Boyett case presents a clear example of the folly of providing counsel to an accused in the name of fairplay, without an opportunity by counsel, equal to that of the prosecution, to present relevant and credible evidence to the factfinder. Even the most gifted counsel requires evidence to persuade a jury.

In pertinent part, the Sixth Amendment provides that in all criminal prosecutions a defendant shall "have compulsory process for obtaining witnesses in his favor." The compulsory process clause is not limited to providing an accused with the power to subpoena witnesses, but entails the fundamental right to present evidence to the factfinder. *Washington v. Texas,* supra at 19. In *Chambers v. Mississippi* this Court said, "few rights are more fundamental than that of an accused to present witnesses in his own defense." 410 U.S. at 302. More recently, in *Taylor v. Illinois,* 484 U.S. 400 (1988), this Court stated, "The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact." 484

U.S. at 409. See also *Pennsylvania v. Ritchie,* 480 U.S. 39, 56 (1987) ("Our cases establish, at a minimum, that criminal defendants have a right to the Government's assistance in compelling the attendance of favorable witnesses at trial *and the right to put before the jury evidence that might influence the determination of guilt.*")

In *Washington v. Texas,* supra, this Court spelled out the significance of the Sixth Amendment right of the accused "to have compulsory process for obtaining witnesses in his favor." This Court noted, "The right to offer testimony of witnesses, and compel their attendance, if necessary, is in plain terms the right to present a defense." 388 U.S. at 14. The Sixth Amendment's policy is reinforced by the broad requirement of fundamental fairness that the due process clause of the Fifth Amendment imposes. In *Chambers v. Mississippi,* supra, this Court said, in the course of a discussion of due process, "Few rights are more fundamental than that of an accused to present witnesses in his own defense." 410 U.S. at 302.

This Court, on more than one occasion, has protected a defendant's right to present a defense. In *Washington v. Texas,* supra, this Court was confronted with a state statute that prevented persons charged as principals, accomplices, or accessories in the same crime from being introduced as witnesses for one another. This Court reasoned that the Sixth Amendment was designed in part "to make the testimony of a defendant's witnesses available on his behalf in court," 388 U.S. at 22. By preventing the defendant from having the benefit of his accomplice's testimony, "the State arbitrarily denied him the right to put on the stand a witness who was physically

and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." 388 U.S. at 23.

Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony. In *Chambers v. Mississippi,* supra, this Court invalidated a State's hearsay rule on the ground that it abridged the defendant's right to present witnesses in his own defense. Chambers was tried for a murder to which another person had repeatedly confessed in the presence of acquaintances. The State's hearsay rule, coupled with a "voucher" rule that did not allow the defendant to cross-examine the confessed murderer directly, prevented Chambers from introducing testimony concerning those confessions, which were critical to his defense. This Court reversed the judgment of conviction, holding that when a rule of evidence conflicts with the right to present witnesses, the rule may "not be applied mechanistically to defeat the ends of justice," but must meet the fundamental standards of due process. 410 U.S. at 302. See also *Rock v. Arkansas,* 483 U.S. 44 (1987) (A State's evidentiary rule which excludes a criminal defendant's hypnotically refreshed testimony violates that defendant's right to present a defense guaranteed by the Sixth Amendment if the rule provides for a per se prohibition of evidence on the ground that such testimony is always unreliable).

Petitioner acknowledges that the right to call witnesses, like many other constitutional rights, is not absolute. The right to present relevant testimony is not without limita-

tion. "The right 'may, in appropriate cases, bow to accommodate other interests in the criminal trial process.' " *Rock v. Arkansas,* supra at 55-56, quoting *Chambers v. Mississippi,* supra at 295. The State's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition of firm, though not always inflexible, rules relating to the presentation of evidence. *Taylor v. Illinois,* supra at 411. For example, a defendant is not entitled to burden the proceedings with cumulative testimony. See *United States v. Wilson,* 732 F.2d 404, 412 (5th Cir. 1984); *Ross v. Estelle,* 694 F.2d 1008, 1011 (5th Cir. 1983).

In this case the Fifth Circuit reasoned that "an accused's right to compulsory process must give way to the witness' Fifth Amendment privilege not to give testimony that would tend to incriminate him." *United States v. Boyett,* at page 379. Other opinions have held that a defendant's right to call witnesses does not ordinarily overcome a witness' Fifth Amendment privilege against self-incrimination. See *United States v. Kahn,* 728 F.2d 676, 678-679 (5th Cir. 1984); *United States v. Melchor-Moreno,* 536 F.2d 1042, 1046 (5th Cir. 1976); *United States v. Goodwin,* 625 F.2d 693, 700 (5th Cir. 1980). In this case the Fifth Circuit holds that the Fifth Amendment privilege strictly, invariably, and without exception stymies an accused's Sixth Amendment right. *United States v. Boyett,* 923 F.2d at 379. Any restriction on a defendant's right to present a defense "may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock v. Arkansas,* at 55-56. In other words, the interest served by such a restriction must justify the limitation imposed on a defendant's constitutional right to call witnesses in his defense. *Id.,* at 56.

The opinion below, by holding that an accused is always precluded from eliciting favorable testimony from a witness who asserts the testimonial privilege, simply ignores the rule of law announced in *Washington v. Texas,* supra, *Chambers v. Mississippi,* supra, and *Rock v. Arkansas,* supra, namely, that a per se rule, void of exception, which prohibits the admission of defense testimony is at minimum suspect and cannot curtail or emasculate a defendant's constitutional right to present evidence to the factfinder. The Court of Appeals' prophylactic, yet arbitrary, holding failed to consider or evaluate (1) the impact of Jones' willingness to forego the privilege as to certain matters, (2) whether Brown could validly claim the testimonial privilege, and (3) whether Jones' or Brown's Fifth Amendment assertion in fact stymied the Government from pursuing effective cross-examination.

The Government on appeal to the Fifth Circuit contended that a defendant's right to compulsory process to obtain favorable testimony "does not suggest a right to supersede a witness' invocation of his own Fifth Amendment privilege," citing *United States v. Chagra,* 669 F.2d 241, 260 (5th Cir. 1982) *cert. denied,* 459 U.S. 846 (1982); *Washington v. Texas,* supra at 23 n. 21; *Roussell v. Jeane,* 842 F.2d 1512, 1516 (5th Cir. 1988); *United States v. Fricke,* 684 F.2d 1126, 1130 (5th Cir. 1982) *cert. denied,* 460 U.S. 1011 (1983); and *United States v. Goodwin,* 625 F.2d 693, 700 (5th Cir. 1980).

With regard to Jones, Boyett does not argue that his Sixth Amendment right foreclosed Jones from asserting his Fifth Amendment privilege. Instead, Boyett contends that Jones should have been allowed to testify to the jury concerning those matters about which he was willing to waive the Fifth Amendment, or that were not incrimi-

nating. The Fifth Circuit's conclusion that Jones' testimonial privilege outweighs Boyett's right to present a defense, ignores Fifth Circuit precedent in *United States v. Goodwin,* supra; *United States v. Melchor-Moreno,* 536 F.2d 1042 (5th Cir. 1976); and *United States v. Gomez-Rojas,* 507 F.2d 1213 (5th Cir. 1975).

A trial judge must make a proper inquiry into the legitimacy and scope of a witness' assertion of his Fifth Amendment privilege. *United States v. Goodwin,* supra at 701. Concomitant with this duty a trial court must make "a particularized inquiry, deciding, in connection with each specific area that the questioning party wishes to explore, whether or not the privilege is well-founded." *Id.,* quoting *United States v. Melchor-Moreno,* supra at 1049. Boyett contends that even though the trial court was satisfied about the validity of the Fifth Amendment claim, it must give heed to the proper scope of such a claim. Although a witness may have a valid claim to the privilege regarding some questions, the scope of the privilege may not extend to all relevant questions. *Id.* The finding of a valid claim does not normally foreclose all further questions. Jones could be totally excused, only after the court found that he could "legitimately refuse to answer essentially all relevant questions." *Id.,* citing *United States v. Gomez-Rojas,* supra at 1220.

In this case the District Court made an adequate inquiry regarding Jones' Fifth Amendment claim. When Jones refused to answer questions about uncharged matters, the court prohibited Boyett from eliciting any of Jones' proffered testimony. If a witness intends to assert the privilege as to essentially all questions, the court may, in its discretion, refuse to allow him to take the stand. *United States v. Goodwin,* supra at 701; *United States*

v. Gomez-Rojas, supra at 1220. It does not follow that the Court may withhold all the evidence of the witness merely because some of it is protected from disclosure by the Fifth Amendment. *United States v. Goodwin,* supra at 701; *United States v. Melchor-Moreno,* supra at 1049. Jones should have been allowed to testify about those matters for which he waived his privilege, and those matters which were not privileged. The appropriate course of action in this case was to permit Jones to testify about the events and circumstances of June 27 and 28, including his assertion that Boyett was not involved in the methamphetamine operation. The statements of Jones made to the DEA Agents when the warrant was executed were not hearsay from Jones, and he should have been permitted to testify about them. This is not a case where Boyett wished to put Jones on the stand merely for the jury to observe him assert the Fifth Amendment. His direct testimony was substantial and critical to the defense of Boyett.

The District Court failed to follow the Fifth Circuit dictates of *Goodwin* and *Melchor-Moreno,* when, at the request and continued urging of, the Government, it disqualified Brown as a witness without making a sufficient inquiry regarding the merit and parameters of her Fifth Amendment assertion. After Brown made an initial assertion of her testimonial privilege, Boyett's counsel summarized the testimony he was seeking to ellicit. In response to further questioning by the District Court about whether she "wished to answer [counsel's] questions or questions of that type," Brown again asserted her testimonial privilege and indicated that she did not want to answer *any questions.* (S.F. 3: 76-78). The

Government contends that the trial court's inquiry was adequate to allow it to determine that Brown had a valid claim with respect to the questions Boyett's counsel sought to ask.

The District Court's superficial inquiry of Brown is not the type of particularized determination contemplated by the Fifth Circuit in *Goodwin* and *Melchor-Moreno*. By excusing Brown from testifying on behalf of Boyett without making a specific, particularized inquiry regarding the basis or scope of her Fifth Amendment claim, the District Court deprived itself, the Government, and Boyett of the ability to ascertain whether she could validly invoke such a privilege as to essentially all matters relevant to the case. If Brown could not invoke the privilege as to certain material matters, Boyett was entitled to have the jury hear her testimony on those matters.

During the inquiry the witness need not reveal the details of his possible criminal liability. *United States v. Goodwin*, supra at 702. The witness however must describe in general terms the basis of the liability actually feared. *Id.* The witness must give a description that is at least adequate to allow the trial judge to determine whether the fear of self-incrimination is reasonable and, if reasonable, how far that privilege extends. *Id.* The purpose of this scheme is to allow the trial judge to make a decision regarding the witness' obligation to answer each question as asked. *Id.* No such detailed inquiry was made here. In *United States v. Melchor-Moreno*, supra, the court stated, "As to each question, the test is whether the witness is confronted with substantial and 'real' and not merely trifling or imaginary hazards of incrimination," citing *Marchetti v. United States*, 390 U.S. 39, 53 (1968). "Only as to genuinely threatening

questions should [the witness'] silence have been sustained." *United States v. Melchor-Moreno,* supra at 1049.

The Government contends that its desire to have unbridled cross-examination, which has no constitutional foundation, outweighs Boyett's Sixth Amendment right to present a defense. The Court of Appeals' decision in this case inherently adopted that position.

The Government was not denied effective cross-examination. The District Court found that the questions to which Jones asserted his Fifth Amendment privilege were critical to the Government's ability to cross-examine Jones effectively. On direct examination, Jones asserted that Boyett had not been involved in manufacturing methamphetamine at the residence. The prosecutor sought to question Jones about other occasions when he had manufactured methamphetamine at the duplex while Boyett was living there, presumably to cast doubt on Jones' claim that Boyett had no knowledge of a methamphetamine operation. Boyett admitted that he had discovered the laboratory in the attic around the middle of June. (S.F. 3: 138-139). In short, the subject matter upon which the Government wanted to cross-examine Jones to infer Boyett's prior knowledge was cumulative. Therefore, the Government's desire to cross-examine Jones on cumulative matters did not warrant the emasculation of Boyett's right to defend himself with relevant, favorable testimony as mandated and secured by the Sixth Amendment.

United States v. Lord, 711 F.2d 887 (9th Cir. 1983), is on point. In *Lord,* the defendant was prosecuted for narcotic offenses and at trial claimed that he was entrapped by the Government's witness-informer, Joe

Spaulding. A defense witness, Robyn Ogden, who was a waitress at a bar frequented by Spaulding, testified on direct examination that Spaulding very often badgered people for drugs and that he had a poor reputation in the community. During cross-examination, the prosecutor asked Ogden to name the people whom she had introduced as cocaine suppliers to Spaulding. She refused to answer by invoking her Fifth Amendment testimonial privilege. Consequently, the trial court struck Ogden's entire testimony. The Ninth Circuit cautioned that excluding a witness' entire testimony is an extreme sanction and that a trial judge may apply this sanction only when the questions asked on cross-examination pertain to matters directly affecting the witness' testimony. In short, the court emphasized that a judge may not strike the testimony of a witness when the privileged answer pertains to a collateral matter. It opined that the prosecutor's request that Ogden name suppliers of cocaine was collaterally related to her testimony about Spaulding's credibility and his pattern of behavior in seeking cocaine. The trial court therefore erred in striking all of Ogden's testimony.[3] See also *United States v. Kikumura,* 698 F.Supp. 546 (D.N.J. 1988) (Government's motion to strike denied where the cross-examination curtailed by the invocation of the witness' privilege related only to collateral matters).

The questions the prosecutor wanted to ask in this case, namely, whether Jones previously manufactured methamphetamine at the residence, were cumulative and

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3. The Court ultimately considered the error to be harmless. Several other defense witnesses had testified to similar activities by Spaulding. Such is not the case here. Jones and Brown were the only witnesses available to testify to Boyett's non-involvement.

collateral to his proposed direct testimony regarding the events of June 27 and 28, including Boyett's non-involvement with the laboratory.

A criminal trial should be a quest for the truth. As a matter of Constitutional preference we have compromised that quest by enumerated safeguards such as the exclusionary rule, *Weeks v. United States,* 232 U.S. 383 (1914); *Mapp v. Ohio,* 367 U.S. 643 (1961), and the right against self-incrimination, *Hoffman v. United States,* 341 U.S. 479 (1951). The United States Constitution does not expressly provide that the Fifth Amendment privilege against self-incrimination is superior to the right of an accused to present a defense guaranteed by the Sixth Amendment. In this case the Government had the ability to remove the impediment to complete cross-examination of Jones, and that same impediment which precluded Brown from testifying. While a court may not require the Government to grant immunity to a witness, *Pillsbury Company v. Conboy,* 459 U.S. 248 (1983), the District Court should have considered the Government's unilateral right to do so in determining whether the Government was denied effective cross-examination.[4] On the one hand, the Government is the instrument of criminal prosecution which renders prudent a claim of privilege pursuant to the Fifth Amendment, and at the same time the Government possesses the power to remove the claim of privilege and compel a witness' testimony.

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4. In an appropriate case the refusal of the Government to immunize a defense witness might be at once so damaging to the defense and so unjustifiable in terms of legitimate governmental objectives, that the refusal to grant immunity would be a denial of due process of law to the defendant and preclude his conviction. *United States v. Taylor,* 728 F.2d 930, 935 (7th Cir. 1984); *United States v. Patterson,* 819 F.2d 1495, 1506 (9th Cir. 1987).

The Fifth Circuit, by enunciating a rote rule that "an accused's right to compulsory process must give way to the witness' Fifth Amendment privilege not to give testimony that would tend to incriminate him," has insulated the Government from accountability regarding the need for the witness to claim the Fifth Amendment, and the legitimacy of the Government's interest in withholding immunity. Such a mechanical rule runs as much afoul of the Sixth Amendment as those evidentiary rules struck down by this Court in *Rock v. Arkansas,* supra, *Washington v. Texas,* supra and *Chambers v. Mississippi,* supra.

CONCLUSION

For all of the foregoing reasons, Petitioner, Koby Dean Boyett, respectfully suggests that his Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

OLNEY G. WALLIS
1900 North Loop West, Suite 500
Houston, Texas 77018
(713) 956-1300
(713) 680-0804 (Fax No.)

Attorney for Petitioner
Koby Dean Boyett

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2017

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

KOBY DEAN BOYETT,
Defendant-Appellant.

Appeal From the United States District Court
for the Southern District of Texas

(January 30, 1991)

Before JOHNSON, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

Koby Dean Boyett was convicted of aiding and abetting the manufacture of over 100 grams of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846, and 18 U.S.C. § 2. On appeal Boyett challenges the exclusion of certain evidence by the district court. We affirm.[1]

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1. Boyett also challenges the sufficiency of the evidence and the validity of the indictment. Neither claim warrants extended discussion. As to the former claim, we believe that on the evidence presented at trial a rational jury could have concluded, beyond a reasonable doubt, that Boyett was guilty of the charged offense. *See* ***United States v. Lowenberg,*** 853 F.2d 295, 305 (5th Cir. 1988),

I.

In June 1989 Boyett moved to Spring, Texas to live with his cousin, Troy Jones, and Jones's girlfriend, Carrie Brown. In a matter of days Boyett discovered a methamphetamine laboratory in the attic of his cousin's duplex. Boyett claims that he never confronted Jones about his discovery. He also claims that he was ignorant of his cousin's reasons for wanting to go to a chemical supply store on the afternoon of June 27th. Agents of the Drug Enforcement Administration were conducting surveillance at Scientific Chemical Company that day when a car driven by Boyett entered the parking lot. They watched as Jones asked to purchase various chemicals known to be used in the manufacture of methamphetamine. They also saw Boyett enter the store to counsel with his cousin for a moment before Jones completed the purchase.

After leaving the chemical supply store, Jones and Boyett realized that they were being followed. Boyett made several passes through a shopping center parking lot in an attempt to shake his pursuers; and at one point he peered into a stopped car belonging to one of them. Jones and Boyett eventually returned to the duplex. That evening Jones manufactured methamphetamine in the attic laboratory. The smell was so potent that agents watching the house from the street were able to detect it. The next morning Boyett was seen nervously and repeatedly going in and out of the duplex; once, in fact, he ran into the duplex at the sight of an approaching car.

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cert. denied, 109 S. Ct. 1170 (1989). As to the latter claim, despite any error in statutory citation, the indictment gave a clear and accurate description of the crime with which Boyett was charged. The error was not one hat could have reasonably misled the de- The error was not one that could have reasonably misled the de- Fed. R. Crim. P. 7(c)(3).

DEA agents obtained a warrant and searched the duplex later that day. In addition to discovering the attic laboratory, the agents found traces of methampretamine and several weapons in Boyett's room. The room was located in a loft area only a few yards away from the entrance to the attic. The stench, which permeated the entire duplex, was particularly strong in this room. Agents questioned Brown and Jones on the scene con cerning, among other things, the level of Boyett's involvement in the methamphetamine enterprise; both denied his participation.

II.

A.

Early in the trial Boyett made it known that he intended to call Jones and Brown as witnesses in his defense. The government objected to the testimony of both witnesses, anticipating that they would avoid material lines of government cross-examination by asserting Fifth Amendment protection against self-incrimination. Thus, the court held an evidentiary hearing to determine the validity and scope of the privilege covering both witnesses, ultimately ruling that neither witness should be permitted to testify. Boyett contends that this ruling was an abuse of discretion, and that it effectively deprived him of his Sixth Amendment right of compulsory process to obtain favorable testimony. We disagree.

Boyett argues that in excluding this testimony the district court subordinated his constitutional right to present a defense, *see Chambers v. Mississippi,* 410 U.S. 284 (1973); *Washington v. Texas,* 388 U.S. 14 (1967), to the government's non-constitutional right to effective

cross-examination. But there is more at stake here than merely the government's strategic interests: the district court was also contending with the witnesses' invocations of a constitutional privilege. When the two are in conflict, we have stated that "an accused's right to compulsory process must give way to the witness' Fifth Amendment privilege not to give testimony that would tend to incriminate him." *United States v. Khan,* 728 F.2d 676, 678 (5th Cir. 1984). *See also United States v. Chagra,* 669 F.2d 241, 260 (5th Cir.), *cert. denied,* 459 U.S. 846 (1982).

The district court properly investigated the legitimacy and scope of the privileges extending to Jones and Brown and in both cases deemed their pleas well-founded. *See United States v. Goodwin,* 625 F.2d 693, 701 (5th Cir. 1980). Notwithstanding Boyett's unsubstantiated assertions to the contrary, there is no evidence to indicate that either Brown or Jones were coerced in any way. Their assertions of privilege were prompted by reasonable apprehension of prosecution and encompassed matters material to Boyett's knowledge of and involvement in the methamphetamine operation. We conclude that the district court's decision to sustain privilege protection to both witnesses has substantial support in the record. And we find that the court acted well within its discretion in striking all, not merely a portion, of the testimony of these witnesses. *See United States v. Nobles,* 422 U.S. 225, 241 (1975); *Lawson v. Murray,* 837 F.2d 653, 655-56 (4th Cir.), *cert. denied,* 488 U.S. 831 (1988).

B.

The district court ruled the out-of-court statements of Brown and Jones inadmissible hearsay and on this

basis disallowed Boyett's inquiry into the DEA agents' knowledge of such statements. Boyett offers an assortment of reasons for why these statements should have been admitted: as statements against interest; as excited utterances; or as non-hearsay to prove the government's failure to seek further exculpatory evidence. In each instance, Boyett strains ill-suited facts to the proffered exception; yet, in no instance does he demonstrate that the district court abused its discretion by excluding this evidence.

C.

Finally, Boyett challenges the district court's refusal to certify his physical therapist as an expert to express the opinion that he was incapable of running or walking without a limp. District courts enjoy considerable discretion in these matters, and we will not disturb a court's ruling absent some showing of manifest error. *See Peteet v. Dow Chemical Co.*, 868 F.2d 1428 (5th Cir.), *cert. denied*, 110 S. Ct. 328 (1989). We find none.[2]

AFFIRMED.

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2. Boyett called this witness to impeach the testimony of the DEA agents who claimed to have seen him run. We note that while the court withheld expert certification, it allowed the physical therapist to state substantially the same opinions as a lay witness.

APPENDIX B

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

(Entered April 30, 1990)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

Case Number H-89-00249-01

UNITED STATES OF AMERICA

v.

COBY DEAN BOYETT
True Name: Koby Dean Boyett

Olney G. Wallis
Defendant's Attorney

THE DEFENDANT was found guilty on count 2 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count, which involve the following offenses:

Title & Section	Nature of Offense	Count No.
21:841(a)(1), 841(b)(1)(B) 846 and 18:2	Aid and abet in attempt to manufacture more than 100 grams of methamphetamine.	2

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on counts 1 and 3 and is discharged as to such counts.

It is ordered that the defendant shall pay to the United States a special assessment of $50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. UNITED STATES ATTORNEY'S OFFICE, Financial Litigation Unit, P.O. Box 61129, Houston, Texas 77208.

December 18, 1989
Date of Imposition of Sentence

/s/ MELINDA HARMON
Signature of Judicial Officer

Melinda Harmon
United States District Judge
Name & Title of Judicial Officer

March 26, 1990
Date

Defendant's Soc. Sec. Number:
435-27-8789

Defendant's mailing address:
P.O. Box 12746
Alexandria, Louisiana 71315

Defendant's residence address:
P.O. Box 12746
Alexandria, Louisiana 71315

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED TWENTY (120) months.

The Court makes the following recommendations to the Bureau of Prisons: that some medical facility be found for Boyett which will aid him in his recovery from his accident and definitely find some facility that has the appropriate conditions for him.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as notified by the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

The defendant is not to commit any crime, federal, state or local.

The defendant is prohibited from possessing a firearm or other dangerous weapon.

The defendant is to provide the probation officer access to any requested financial information.

The defendant is prohibited from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

APPROVED AS TO FORM: /s/ J.D.